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No. ____________

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JACK C. GIVENS, WALTER A. WELLS, JAMES L. ROBBINS, ELMER F. LORMAN, and CHARLES E. FORSETH,

Petitioners,

vs.

UNITED STATES RAILROAD RETIREMENT BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1) Whether nonacquiescence in an unappealed appellate decision may be incorporated into an agency's strict literal interpretation of a subsequent statutory scheme to negate vested entitlements of

retirees.

2) Whether that application of the statutory scheme violates the Due Process Clause of the Fifth Amendment by depriving vested retirees of rights on the basis of new eligibility criteria unrelated to their work records and by establishing a disfavored classification of vested retirees defined exclusively by the agency's refusal to follow explicit precedent from an appellate court.

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OPINION BELOW

The opinion of the Court of Appeals on the five consolidated petitions for review, D.C. Circuit Nos. 82-2183, -2184, -2185, -2312, -2313, which is reported at 720 F.2d 196, appears as Appendix A. Relevant administrative actions from which those petitions were taken appear as Appendices B-F.

JURISDICTION

The decision of the Court of Appeals was filed on October 28, 1983. A timely filed suggestion of rehearing *en banc* was rejected on December 21, 1983 (Appendix G), and this petition is filed within 90 days of that decision. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES

The following statutes relevant to the consideration of this petition are set out verbatim in Appendix H:

45 U.S.C. §231b(h)(3)

45 U.S.C. §231b(h)(4)

45 U.S.C. §231b(h)(6)

45 U.S.C. §231b(m)

STATEMENT OF THE CASE

1.a. The predecessor of the Railroad Retirement Act of 1974 ("the RRA"), 45 U.S.C. §231 _et seq_., the Railroad Retirement Act of 1937, 45 U.S.C. §228 _et seq_., was structured so that workers covered under it and the Social Security Act received their full entitlement from both, without an offset. See _U.S. Railroad Retirement Board v. Fritz_, 449 U.S. 166, 168

& n.1 (1980). In 1974, Congress undertook to phase out this system, known as dual benefits. Id., at 169-170. In general, this was accomplished by continuing to recognize the rights of those who had retired or were vested prior to the effective date of the RRA, January 1, 1975. Id., at 171-172.

Sections 3(h) and 3(m) of the RRA, 45 U.S.C. §231b(h), (m), provide the mechanism to achieve this goal. The latter reduces railroad benefits by the amount of Social Security benefits received, while the former restores the reduction when the vesting and work-related criteria are satisfied. See 45 U.S.C. §231b(h)(1)-(4); Gebbie v. U.S. Railroad Retirement Board, 631 F.2d 512, 513 (7th Cir. 1980).[1] Thus,

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1/Subsections (h)(3) and (4) concern those railroaders whose Social Security entitlement derives from their spouses' (cont.)

in the long run, Congress resolved to preserve vested rights. See *Gebbie*, 631 F.2d, at 515.

b. In March, 1977, this Court held unconstitutional the Social Security Act provisions which had deprived non-dependent males of spousal benefits. See cases cited in *Gebbie*, 631 F.2d at 512 & n.2 (collectively referred to as "*Goldfarb*"). As a consequence, many male railroaders (as well as other husbands and widowers) began to receive Social Security spousal benefits. The Board applied §231b(m) to reduce their railroad benefits by the amount of their Social Security benefits.

1/ (cont.)

work in Social Security-covered employment; "both sections [(3) and (4)] raise the same problems of interpretation," *Gebbie*, 631 F.2d, at 513 (footnote omitted), and, for simplicity's sake, this discussion will refer only to subsection (h)(3).

amounts pursuant to §231b(h)(3), however. Adopting its General Counsel's opinion, it concluded that the determinative language of that provision -- that restoration was to be made only where the former railroader "would have been entitled ... under the provisions of the Social Security Act _as in effect on December 31, 1974_" (emphasis supplied) -- was not applicable to men who began to receive Social Security benefits pursuant to _Goldfarb_. An estimated 20,000 to 50,000 men with vested railroad benefits were therefore deprived of any relief from _Goldfarb_, for their railroad benefits were reduced by their Social Security benefits.

c. This interpretation of §231b(h)(3) was challenged by three men seeking to represent all affected railroaders. _Gebbie v. Chamberlain_, No. 78-1030 (C.D.Cal.,

filed March 17, 1978). In a stipulation signed by the Court, it was agreed that the case should proceed as a nationwide class pursuant to Rule 23(b)(2), F.R.Civ.P. formal certification was postponed pending a ruling on the merits. The Court then dismissed the complaint on the alternative grounds that the named plaintiffs had not exhausted and that exclusive jurisdiction was vested in the appellate courts, pursuant to 45 U.S.C. §§355(f) and 231g.

Proceeding next before the Seventh Circuit, the three were unsuccessful in obtaining class certification, Gebbie, 631 F.2d, at 516 n.9, but were upheld on the merits. The Court held that Goldfarb had stated the law, not changed it, so that the plaintiffs and their wives had been entitled "under the provisions of the Social Security Act as in effect on December 31, 1974." Consequently, the

offset amounts would be restored under §231b(h)(3). *Id.*, at 516.

d. The Board neither appealed nor applied the holding to the thousands of others in the same situation. It chose instead to "non-acquiesce" in the Seventh Circuit's decision, continuing to pay reduced railroad benefits. On August 13, 1981, the President signed the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357. One provision of this massive package became 45 U.S.C. §231b(h)(6), the section here at issue. Effective upon signing, it states, in its entirety: "No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to August 13, 1981."

Under its literal reading of §231b(h)(6), the Board's prior intentional misappli-

cation of §231b(h)(3) became the basis for negating vested entitlements, for the Board had not taken affirmative administrative action to determine entitlements under §231b(h)(3). In short, the Board's non-acquiescence in Gebbie became the proximate cause for the divestment of thousands of entitled beneficiaries.

2. Jack Givens, Walter Wells, James Robbins, Elmer Lorman, and Charles Forseth are men in their seventies and eighties, living in Ohio, California, and New Jersey. They spent their entire working lives with railroads around the country.

Each of these men retired, fully vested under the Railroad Retirement Act prior to 1975. Their wives were fully vested in the Social Security Act prior to that date. Accordingly, but for the Board's incorrect interpretation of §231b(h)(3), they would have suffered no offset of their

railroad benefits.

After the Goldfarb decisions in 1977, each received a baffling array of notices from the Board, purporting to explain the reduction in their railroad benefits.[2/] Mr. Givens, for instance, was informed that his amount had been cut by $178 per month. Because of the misleading way in which the information on the reduction and on his right to appeal had been provided, an appeals referee waived his time limitation for administrative appeal, and he received a timely final decision from the Board relying on §231b(h)(6) to negate his

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2/ Much of the confusion was generated by the fact that the Board is responsible for administering payment of Social Security benefits, 45 U.S.C. §231f(b)(2), so that each man continued to receive exactly the same amount in one check from the same agency as before. The difference, explained only in the most abstruse manner, was that a part of the check now emanated from the Social Security fund, and the railroad benefit had been cut accordingly.

entitlement. App. B.

The other four petitioners waded through a similar morass of confusing Board communications, none of which properly alerted them to what had happened and to what rights they possessed to protest that action. In each instance, however, these men protested the Board's action as soon as they understood what in fact had happened, and then sought review in the Court of Appeals.3/

3. The Court of Appeals rejected all of petitioners' arguments. First, it held that "the dispositive effect of Gebbie was clearly limited to the three petitioners in that case," so that "Gebbie bound the Board

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3/ In each case, the Board claimed that the petition below should be dismissed because of failure to exhaust and/or appeals were untimely filed. The Court below did not reach these procedural issues, as it upheld the Board's position on the merits in the Givens case. See App. A, at A-4.

only as to the three...." App. A, at A-14 (emphasis in original). Thus, the Board was free not to determine entitlement to others in that position, and to apply §231b(h)(6) accordingly.

Secondly, it distinguished Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982), on the grounds that a procedure was denied in that case (a time-limited hearing) while there was none denied by §231b(h)(6). App. A, at A-19 - 20.

Thirdly, it held that equal protection guarantees were not violated, for the line drawn by §231b(h)(6) "does not establish a wholly irrational classification," App. A, at A-23, and the provision did not "improperly insulate[ ] the dependency requirements found unconstitutional in Goldfarb." App. A, at A-24.

The Court below followed closely the prior decision on this issue, Frock v. U.S.

Railroad Retirement Board, 685 F.2d 1041 (7th Cir. 1982), cert. denied, 103 S.Ct. 1185 (1983). Another case on the issue has been filed, Spraic v. U.S. Railroad Retirement Board, No. 83-7908 (9th Cir., filed Dec. 5, 1983), and oral argument is expected in June, 1984.

REASONS FOR GRANTING THE WRIT

I. THE BOARD'S NONACQUIESCENCE IN GEBBIE VIOLATES ESTABLISHED PRINCIPLES OF SEPARATION OF POWERS, AND THE DECISION UPHOLDING THAT NONACQUIESCENCE IS IN CONFLICT WITH DECISIONS FROM SEVERAL OTHER APPELLATE COURTS

The unappealed decision in Gebbie obligated the Board to determine entitlement for every other railroader using the same interpretation of §231b(h)(3). By upholding the Board's refusal to take that action,

the Court below placed itself directly in opposition to the growing number of courts which have emphatically rejected non-acquiescence.

It is undisputed that the entitlement of these five men and thousands in the same situation existed. See Gebbie, 631 F.2d, at 512, 513, 515. They lacked only a formal administrative determination of that entitlement. The Board was obligated to make that determination because (1) the statute mandates the Board to make awards to entitled beneficiaries, 45 U.S.C. §§231f(b)(1), (3) (and mandatory language deprives an agency of discretion, Califano v. Yamasaki, 442 U.S. 682, 693-694 & n.9 (1979)); and (2) Gebbie established that these were entitled beneficiaries. Consequently, entitlement should have been determined prior to August 13, 1981, and §231b(h)(6) is properly interpreted to reflect the Board's legal obligation, rather

than its refusal, in fact, to satisfy that obligation.[4/]

The Board response to this analysis is that Gebbie's impact was defused by its nonacquiescence. The Court below agreed with the Board on this crucial aspect of petitioners' argument, holding that "until the appearance of more far-reaching precedent, the Board was free to apply its interpretation of section 3(h)(3) and 3 (h)(4)." App. A, at A-16. This rejection of a controlling appellate decision directly conflicts with several other appellate courts, in cases involving the NLRB, the

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4/ Ironically, the Board's literal interpretation of §231b(h)(6) parallels its literal reading of §231b(h)(3). With the latter, it had held that, as a matter of fact, there had existed no entitlement on December 21, 1974 (since Goldfarb did not recognize that entitlement until 1977). With (h)(6), it concluded that there had to be a determination of entitlement in fact, ignoring its obligation to make that determination.

[illegible]

[illegible]

[illegible]

Social Security Administration ("SSA"), and the Board itself. Repeatedly, in the last several years, the Second, Third, Eighth and Ninth Circuits have categorically rejected agencies' claims of a right to ignore established precedents simply because a class was not certified.

Most recently, the Ninth Circuit severely criticized the Secretary of the Department of Health and Human Services for her nonacquiescence policy on SSA matters:

> "[T]he Secretary is deliberately and unequivocally flouting the procedures she is required by law to follow.... [T]he Secretary here knows precisely what the courts say the law is and is nevertheless refusing to apply the law as so defined. That the Secretary, as a member of the executive, is required to apply federal law as interpreted by the federal courts cannot seriously be doubted." Lopez v. Heckler, 725 F.2d 1489, 1503 (9th Cir. 1984) (citations omitted).

The Court also recognized that executive agencies' refusal to follow controlling law strikes at the core of our system:

> "Far from raising questions of judicial interference in executive actions, this case presents the reverse constitutional problem: the executive branch defying the courts and undermining what are perhaps the fundamental precepts of our constitutional system -- the separation of powers and respect for the law." Id., at 1497 (footnote and citations omitted).

This corroborated other recent pronouncements from that court. Murray v. Heckler, 722 F.2d 499, 501 (9th Cir. 1983); Lopez v. Heckler, 713 F.2d 1432, 1438 (9th Cir. 1983) (denying motion for partial stay); see also Heckler v. Lopez, 104 S.Ct. 10, 12 (1983) (Rehnquist, J., granting partial stay); Heckler v. Lopez, 104 S.Ct. 221, 226-227 (1983) (Brennan, J., dissenting from denial of application to vacate partial stay); Siedlecki v. Schweiker, 563 F. Supp. 43, 47-48 (W.D.Wash.1983).

The Eighth Circuit has been no less emphatic in its denunciation of non-acquiescence by the Social Security Administration. Hillhouse v. Harris, 715 F.2d 428, 420 (8th Cir. 1983), aff'g 548 F.Supp. 88, 92-93 (W.D.Ark. 1982) (Arnold, Circuit Judge, sitting by designation); see especially 715 F.2d, at 430 (McMillian, J., concurring) (Secretary threatened with contempt if nonacquiescence continues).

These strident repudiations of SSA's action follow closely on the Second and Third Circuits' refusal to accept nonacquiescence by the NLRB:

> "The essence of the common law doctrine of precedent or stare decisis is that the rule of the case creates a binding legal precept. The doctrine is so central to Anglo-American jurisprudence that it scarcely need be mentioned, let alone discussed at length." Allegheny General Hospital v. NLRB, 608 F.2d 965, 969 (3d Cir.1979); see Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.) cert. denied 449 U.S. 975 (1980); see

also, e.g., Hyatt v. Heckler, 579 F. Supp. 985, 999 (W.D.N.C. 1984); Flores v. Secretary of H.E.W., 228 F.Supp. 877, 878 (D.P.R. 1964).

Indeed, the Board itself has recently been castigated for ignoring appellate precedent. Judge Kaufman left no doubt as to his Circuit's view of the Board's unilateral action:

> "[W]e strongly caution the Board against ignoring rules of law established by this Court and other Courts of Appeals which have not been overruled by the Supreme Court. [The Board] ... has no discretion to substitute its view of the law for those principles which we have already formulated." Kirkland v. U.S. Railroad Retirement Board, 706 F.2d 99, 104 (2d Cir. 1983)

That is precisely the action which the Board took in this case: a substitution of its view of §231b(h)(3) for that of the Seventh Circuit. The Court below has absolved the Board of any wrongdoing in that action, but, as the other Courts of Appeals have repeatedly observed, neither the

Board nor any other agency has the right to ignore appellate opinions on point.

The Court below is thus in conflict with at least four other appellate courts. It has repudiated a cornerstone of the American judicial system, first announced in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). This Court should therefore grant the petition to resolve this conflict and establish whether federal agencies may "substitute [their] view of the law for principles ... already formulated." Kirkland, 706 F.2d, at 104.[5/]

5/ A subsidiary issue is the extent of Gebbie. The Court below appeared to confuse that question with the initial inquiry as to the propriety of nonacquiescence. Regardless of the breadth of Gebbie's impact, the crucial first issue remains whether the precedential effect of Gebbie applies to any but the individual petitioners in that case. If it does, as petitioners argue, then it should not be limited to railroaders living in the geographical region encompassed by the Seventh Circuit; it should apply to all railroaders, for the (cont.)

II. THE VALIDATION OF IMPROPER BOARD ACTION REPUDIATES FUNDAMENTAL NOTIONS OF DUE PROCESS AND FAIRNESS, AND CONFLICTS WITH THIS COURT'S DECISION IN LOGAN V. ZIMMERMAN BRUSH CO.

Implicit in Congress' 1974 decision to gradually phase out dual benefits is the importance of preserving vested rights.

5/ (cont.)

judicial review provisions of the RRA, 45 U.S.C. §355(f), incorporated by §231g, expressly vest the Seventh Circuit with jurisdiction over the claims of all railroaders. Consequently, Gebbie became the controlling interpretation for the country not, as the Court below held, because it was the first case on the issue, App. A, at A-15, but because of the RRA's peculiar review provisions.

Furthermore, whatever the jurisprudential preference for several appellate decisions, id., at A-15, this Court has recognized that there is no requirement for multi-circuit review, Yamasaki, 442 U.S., at 702-703; the preference must give way to review provisions which expressly vest jurisdiction over all claims in the Seventh Circuit. If Gebbie is not limited to the three individuals, it must apply to everyone; there is no middle point.

Whatever savings were to be effected would derive from those who were not vested. As the Seventh Circuit recognized, the men whose dual status derived in part from the work of their wives were no less deserving of having their rights protected than were any other dual eligibles. Gebbie, 631 F.2d, at 516. Consequently, if the Board's literal interpretation of §231(h)(6) is upheld, the effect is a repudiation by Congress of vested rights premised on the extraordinary notion that the intransigence of a responsible agency may serve as the determinative factor.

The Board's improper application of §231b(h)(6) does not repudiate §231b (h)(3) or Gebbie; instead, it institutionalizes the Board's response to Gebbie, destroying entitlement on the basis of the Board's action and ignoring the procedural hurdles which prevented thousands of men from perfecting their rights.

The Court below misunderstood petitioners' argument, characterizing it as a question of whether due process was violated by the Board's failure to "mak[e] some type of determination prior to August 13, 1981...." App.A, at A-19. The issue, however, is whether due process is violated when an agency's refusal to apply a statute becomes the basis for negating vested rights.

It is undisputed that the Board must make a determination at some point. 45 U.S.C. §231f(b)(1), (3). The Board has also conceded that delay violates due process. Kelly v. U.S. Railroad Retirement Board, 625 F.2d 486, 491 (3d Cir.1980). In this instance, it is not mere delay which petitioners are decrying, but, instead, delay taken to its logical conclusion: an outright refusal to apply the terms of the statute. Employing this action as the mechanism to redefine

eligibility is unprecedented; research discloses no other instance where a responsible agency's refusal to act is then grandfathered into a later-enacted provision as the basis for divestiture. The rhetoric from another due process context is particularly applicable here: "[T]his resembles more a scene from Kafka than a constitutional process." Gray Panthers v. Schweiker, 652 F.2d 146, 168 (D.C. Cir. 1980).

While Congress has not previously employed such a mechanism, this Court has considered a similar situation involving the unintentional deprivation of rights by a responsible agency. In Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982), the Court evaluated a state agency's negligent failure to hold a hearing within a period mandated by statute; as here, that failure was the proximate cause of the claimant's

loss of rights. The procedural deprivation in Logan was significant because of its effect on the property interest which the procedure had been established to protect: "To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." 102 S.Ct., at 1156-1157 (footnote and citation omitted). Logan therefore stands for the unremarkable proposition that an entitlement cannot be destroyed through a procedural mechanism which is entirely within the power of the agency. That is precisely the structure of events here at issue; an existing entitlement is negated because the responsible agency refused to determine entitlement.

In Logan, the entitlement was lost by the agency's unintentional failure to

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comply with a deadline for a hearing. In this instance, the entitlement is lost because of the agency's intentional refusal to comply with the substance of a statute. That one involves the timing of a hearing and the other involves the application of law to the facts does not differentiate the situations for due process purposes. In both instances, the agency has deprived the claimant of procedural rights guaranteed by the statute. If anything, this case represents the more egregious due process violation, for the petitioners have been purposefully deprived of the right to have their entitlement determined, and that deprivation has then served as the fact on which the negation of entitlement is premised.

The Court below missed the point of <u>Logan</u>. While the specific deprivation there is a prior oral hearing, the decision's

logic is no less applicable to any situation where entitlement is destroyed through the agency's failure to accord proper procedures. In Logan, the claimant was denied the opportunity to present his claim of entitlement; in this case, petitioners have been deprived of the next step, the opportunity to have entitlement determined after the claim is presented. That constitutes no relevant legal distinction, however, for the fact remains that, in each case, the agency's failure to satisfy its procedural obligation serves to deprive claimants of an established entitlement.

The Court should therefore grant the writ to consider this unprecedented deprivation of vested rights and the inherent conflict with Logan v. Zimmerman Brush Co., supra.

III. DIVESTITURE PREMISED ON THE AGENCY'S INACTION CREATES AN IRRATIONAL CLASSIFICATORY SCHEME WHICH CONFLICTS WITH THIS COURT'S ANALYSIS IN FRITZ AND LOGAN

The Board's interpretation of §231b(h)(6) creates two classifications of otherwise eligible dual beneficiaries: those whose entitlements under §231b(h)(3) the Board determined and those whose entitlements it refused to determine. The differential treatment of the second, disfavored classification does not "advance[ ] legitimate legislative goals in a rational fashion," Schweiker v. Wilson, 450 U.S. 221, 234 (1981), and conflicts with the standards established by this Court for altering vested rights.

The Court below premised its holding primarily on the truism that linedrawing inevitably produces inequitable results. App. A, at A-22. But this is not an instance

of mere bad luck for those who fall on the "wrong" side of a necessarily arbitrary eligibility line; this was a deliberate effort to deny benefits to a particular group of entitled beneficiaries, using a line expressly designed to accomplish that end.[6/] The Court's linedrawing analysis

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6/ The Court's additional observation that the scheme is supportable as a means of "preserv[ing] the economic stability of the railroad retirement system by phasing out dual benefits" is both incorrect and irrelevant. See App.A, at A-22. Savings were to be accomplished not via §231b(h)(6), but by a provision passed at the same time, 45 U.S.C. §231n(d), which removed the liability for dual benefits from the general railroad fund and created a separate fund consisting exclusively of annual appropriations from Congress. The amount of dual benefits paid out in a given year can never exceed the amount appropriated, nor can the general fund be siphoned off to pay dual benefits. As a consequence, the number of dual beneficiaries cannot affect the annual pay-out of dual benefits, and the dual benefits mechanism can never affect the financial soundness of the system. In any event, the savings of resources alone cannot support a discriminatory scheme. See, e.g., Memorial

(cont.)

ignores the crucial inquiry: can _any_ line be drawn among these identically situated beneficiaries? As one court has framed it: "[T]he linedrawing process must itself rest on a rational foundation." _Bacon v. Toia_, 648 F.2d 801, 809 (2d Cir. 1981), aff'd _sub nom_. _Blum v. Bacon_, 102 S.Ct. 2355 (1982). Here, the line is inappropriate because, in violation of the Court's rulings, it defines the two classifications on the basis of non-work-related criteria which relate solely to the inaction of the responsible agency.

In the divestiture analyzed in _Fritz_, all retired railroaders had their vested rights preserved, while non-vested,

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6/ (cont.)

Hospital v. Maricopa County, 415 U.S. 250 263 (1974); _Shapiro v. Thompson_, 394 U.S. 618, 633 (1969). The fiscal soundness of the railroad fund is thus not at issue in this case.

unretired workers forever lost the right to obtain a dual entitlement. 449 U.S., at 171. Those in the middle, that is, those who were still working but who were vested in both programs as of December 31, 1974, had their rights protected only if they met the additional work-related criterion of finishing their careers in the railroad industry. This factor was objectively gauged by whether they had a "current connection" (45 U.S.C. §231(o)), a measure historically employed in the railroad system. Id., at 171-172. This Court expressly relied on the relationship of the new eligibility conditions to the individual's work history to uphold the rationality of this classificatory scheme. Id., at 178. The divestiture effected in that situation was deemed permissible precisely because it was premised on the work histories of the affected railroaders.

In this instance, however, the deprivation is effected against retirees on the basis of criteria unrelated to their service in the industry. Since they have already retired, they cannot alter their working situation to conform to the new standards, and, of greater significance, the agency's actions, not their own, define compliance with those standards. While this "Ccurt has clearly held that Congress may condition eligibility for benefits such as these on the character as well as the duration of an employee's ties to an industry," *id.*, at 178 n.11, it has never upheld an eligibility condition which deprives beneficiaries of vested rights on the basis of criteria entirely unrelated to their work in the industry.

Furthermore, the decision below conflicts with the equal protection analysis

in Logan.[7/] Justice Blackmun highlighted the irrationality resulting from the state's action in Logan with words remarkably applicable to this case: "[T]he state converts similarly situated claims into dissimilarly situated ones, and then uses this as the basis for its classification. This ... is the very essence of arbitrary state action." 102 S.Ct., at 1161.

The same arbitrary action has here taken place. The factual distinction from Logan, that the event converting eligibility into ineligibility is intentional, only heightens the impropriety. In both instances, it is the government's adverse action which serves to deprive the disfavored class of an entitlement. The line

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7/ "[A] majority of the Members of the Court are favorably inclined toward the [equal protection] claim...." Logan, 102 S.Ct., at 1159 (Blackmun, J., separate opinion).

between those whose entitlements the Board has determined, and those whose entitlements it refused to determine, does not "rest on a rational foundation." Bacon v. Toia, supra, 648 F.2d at 809. Divestiture of retirees' vested rights for reasons unrelated to their work histories, and based solely on the non-compliance of the responsible agency, is, no less than the situation in Logan, "the very essence of arbitrary state action." 102 S.Ct., at 1161.

Because the equal protection analysis of the Court below conflicts with principles established by this Court, the writ should be granted.

CONCLUSION

For the reasons presented, this Court should grant a writ of certiorari to review the decision of the Court of Appeals for the

District of Columbia Circuit. Alternatively, the Court should defer ruling on this petition pending resolution of the identical case now before the Ninth Circuit, Spraic v. U.S. Railroad Retirement Board, No. 83-7908, which is tentatively scheduled for oral argument in June, 1984.

March, 1984

GILL DEFORD
NEAL S. DUDOVITZ
SUSAN J. BALLIET
TRICIA MARGOT BERKE
LEA ANN SMITH
THOMAS R. WUERSIG

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2183

JACK C. GIVENS, on behalf of himself and all others similarly situated, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD, RESPONDENT

No. 82-2184

WALTER A. WELLS, on behalf of himself and all others similarly situated, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD, RESPONDENT

No. 82-2185

JAMES L. ROBBINS, on behalf of himself and all others similarly situated, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD, RESPONDENT

No. 82-2312

ELMER F. LORMAN, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD, RESPONDENT

No. 82-2313

CHARLES E. FORSETH, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD, RESPONDENT

Petition for Review of an Order of the Railroad Retirement Board

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Argued April 26, 1983

Decided October 28, 1983

Gill Deford for petitioners.

Thomas W. Sadler, General Attorney, Railroad Retirement Board, with whom Dale G. Zimmerman, General Counsel, and Edward S. Hintzke, Assistant General Counsel, Railroad Retirement Board, were on the brief for respondents.

Before: GINSBURG and SCALIA, *Circuit Judges*, and VAN PELT,* *Senior District Judge*, United States

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*Sitting by designation pursuant to 28 U.S.C. § 294(d)

District Court for the District of Nebraska.

Opinion for the Court filed by Senior District Judge VAN PELT.

VAN PELT, Senior District Judge: Petitioners challenge the application of Section 3(h)(6) of the Railroad Retirement Act (RRA), 45 U.S.C. § 231b(h)(6), by the United States Railroad Retirement Board (the Board) to their individual cases. The Board's interpretation of Section 3(h)(6) resulted in the railroad retirement annuities of petitioners being reduced by the amount of spousal benefits they received under the Social Security Act (SSA). After careful analysis, we conclude that Section 3(h)(6) was properly applied and that the Board was correct in denying dual benefits to these petitioners.

Of the five petitioners, only one, Jack C. Givens, is clearly and properly before this court. In view of our disposition of the merits of his claims, we need not decide

whether this court has jurisdiction to entertain the claims of the other petitioners.[1] Petitioner Givens raises the following issues on appeal:

1. Whether the refusal of the respondent Railroad Retirement Board to replace petitioners' Railroad Retirement benefits, reduced by the Board pursuant to 45 U.S.C. § 231b(m), violates section 3(h) of the Railroad Retirement Act, 45 U.S.C. § 231b(h).

2. Whether the refusal to replace these benefits is violative of equal protection and due process guarantees embodied in the due process clause of the Fifth Amendment.

3. Whether this case should proceed as a class action on behalf of all other

[1]The cases of the other four-named petitioners (James L. Robbins, Walter A. Wells, Elmer F. Lorman, and Charles E. Forseth) are arguably flawed due to the failure of petitioners to exhaust their administrative remedies and/or file a timely appeal.

men whose railroad benefits were offset by Social Security spousal benefits and not returned pursuant to 45 U.S.C. § 231b (h)(3) and (4), with petitioners Givens, Wells, and Robbins acting as class representatives.

I. BACKGROUND

The Railroad Retirement Act of 1937, 48 Stat. 1283, 45 U.S.C. § 228 et seq., established "a system of retirement and disability benefits for persons who pursued careers in the railroad industry." United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 168 (1980). The 1937 Act allowed persons who worked for the requisite number of years in both the railroad industry and in outside employment covered by the SSA to receive benefits from both systems in excess of what they would have received had they worked exclusively within only one

system. _Fritz_, _supra_, at 168 n.1.

These dual benefits put a significant strain on the financial well-being of the railroad retirement system. Congress attempted to meet this problem with the passage of the Railroad Retirement Act of 1974, 45 U.S.C. § 231 _et seq._, which was designed to eliminate future accruals of dual benefits. _Fritz_, _supra_, at 169. Section 3(m) of the Act, 45 U.S.C. § 231b(m),[2] reduces railroad retirement benefits by the amount of benefits which the retiree receives under the SSA. Section 3(h) of the Act, 45 U.S.C. § 231(h), preserves dual benefits for those railroad workers who

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[2]Section 231b(m) provides:

> The annuity of any individual under subsection (a) of this section for any month shall, after any reduction pursuant to paragraph (iii) of section 231a(a)(1) of this title, be reduced, but not below zero, by the amount of any monthly benefit (before any deductions on account of work) payable to that individual for that month under title II of the Social Security Act.

were so entitled under the SSA "as in effect on December 31, 1974."

Here, we are primarily concerned with section 3(h)(3) and (4). These two subsections maintain dual benefits for those railroad workers who are entitled to spousal benefits under the SSA "as in effect on December 31, 1974." Therefore, under the new Act, a retiree's eligibility for spousal benefits depended on the application of the Social Security Act as it existed on December 31, 1974.

The problem we are addressing in this case begins with Califano v. Goldfarb, 430 U.S. 199 (1977), where the Supreme Court held that a provision of the SSA which required husbands, but not wives, to prove dependency on the insured spouse in order to receive spousal benefits, violated the Fifth Amendment. In order to meet the dictate of Goldfarb, the Board provided all railroad workers, both male and female, with spousal social security benefits. In most cases,

the net effect upon a retiree's benefit package is nil because the worker's railroad retirement annuity is reduced, pursuant to section 231b(m), by an amount equal to the spousal benefit received. However, under Section 231b(h)(3) and (4), the Board does pay dual benefits to those railroad workers whose spouses were "permanently insured under the Social Security Act on December 31, 1974" and who satisfied the eligibility requirements "under the provisions of the Social Security Act as in effect on December 31, 1974." Thus, under the Board's interpretation of this language, the dependency provisions of the Social Security Act which were found to be constitutionally infirm in Goldfarb were to be used in order to determine which persons in this limited group of retirees would be eligible for dual benefits.

In Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (7th Cir.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

1980), the United States Court of Appeals for the Seventh Circuit held that the Board had incorrectly interpreted Section 231b(h) (3) and (4) and that the dependency requirements found invalid in Goldfarb should not be applied as a basis for denying dual benefits. The Gebbie court declined to certify a class action and the decision immediately addressed only the claims of the thee [sic] named petitioners. Id. at 516 n.9. The Board refused to apply the Gebbie decision to other railroad retirees.

Congress addressed the problems raised by Gebbie in the Omnibus Budget Reconciliation Act of 1981 (OBRA), Public Law 97-35, 95 Stat. 357. Section 1118(e)(3) of OBRA added Section 3(h)(6) to the RRA, 45 U.S.C. § 231b(h)(6). Section 3(h)(6) provides: "No amount shall be payable to an individual under subdivisions (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined

prior to August 13, 1981." (Emphasis supplied). The purpose and meaning of Section 3(h)(6) were explained by the Report of the Conference Committee on the OBRA which adopted Section 3(h)(6) from the Senate version of the OBRA:

> The Senate amendment addressed the Gebbie issue by providing that no new windfalls would be payable in connection with annuities awarded after May, 1981, or the enactment date, to any employee based on a spouse's Social Security Act employment. The intent of the provision "unless entitlement of such individual to such amount had been determined prior [sic] the date of the enactment of this subdivision" is to cut off windfall awards in all cases where the processing has, for whatever reason, not been completed and the determinations have not been made.

H.R. Rep. No. 97-208, 97th Cong., 1st Sess. 863, reprinted in [1981] U.S. Code Cong. & Ad. News 1010, 1225.

In Frock v. United States Railroad Retirement Board, 685 F.2d 1041 (7th Cir. 1982), cert. denied, ___ U.S. ___ (1983), the Seventh Circuit upheld the constitutionality of section 3(h)(6) and its application by the Board to deny dual benefits to the Frock petitioners whose entitlements to dual benefits had not been determined prior to August 13, 1981. In addition, the court made it clear that its decision in Gebbie was limited to the petitioners in that case. Frock, supra at 1046.

Petitioner Givens, a retired railroad worker, became eligible for an annuity under the RRA on January 24, 1975. His spouse became insured under the Social Security Act, 42 U.S.C. § 301 et seq., prior to January 1, 1975. On December 11, 1978, Givens received

notice that, as a result of Goldfarb, he was entitled to receive spousal benefits, but because of the RRA offset provision, Section 3(m), his total benefit package would not change. He made a number of inquiries and was told that he could not receive dual benefits because he was not vested under the SSA prior to January 1, 1975. He filed a formal appeal with the Board on April 15, 1980.[3] On November 10, 1981, the Board denied his appeal, holding that his eligibility for dual benefits had not been determined prior to the August 13, 1981, OBRA cutoff date. The Board explained:

> No determination as to his entitlement to a windfall dual benefit has been made in regard to Mr. Givens prior to the resolution of this appeal, either by the Board or by a court. Gebbie was not a class action, and therefore applied

[3]The time for appeal had run. However, the appeals referee determined that Givens had, to some extent, been discouraged from appealing and that this constituted "good cause for a waiver of the time limitations."

only to the three individuals involved in that case. Thus, in effect, section 1118(e)(3) preserves windfalls only for those individuals whose entitlement to such windfalls was determined prior to August 13, 1981, either under the Board's interpretation of that section or by virtue of a court order as was the case with Mr. Gebbie.

On appeal, Givens challenges the application and constitutionality of section 3(h)(6).

II. DECISION

A. The Board's Interpretation

Petitioner first claims that the Board improperly interpreted sections 3(h)(3), 3(h)(4), and 3(h)(6). More specifically, petitioner argues that: (1) the Board was bound by the *Gebbie* interpretation of sections 3(h)(3) and 3(h)(4); (2) *Gebbie* established entitlement for the entire group of

similarly situated railroad retirees; and, (3) section 3(h)(6) should be interpreted in a manner consistent with the Gebbie decision in order to avoid the grandfathering of an improper construction. After careful consideration of these arguments, we affirm the Board's interpretation and application of section 3(h)(6).

Petitioner overestimates the force and scope of Gebbie. First, the dispositive effect of Gebbie was clearly limited to the three petitioners involved in that case. The Gebbie court specifically refused to certify a class for the reason that the court was "not an appropriate forum for such action." Gebbie, supra, at 516 n.9. In Frock, supra, the Seventh Circuit explicitly stated that Gebbie "decided only the entitlement of the individual petitioner in that case." Id. at 1046.

Secondly, Gebbie was only the decision of one circuit court and, although it must be given deference, it need not be taken by the Board as the law of the land. The Seventh Circuit rejected this role of the "ultimate decisionmaker" when it stated that to conclude otherwise would be to make decisions of the Seventh Circuit binding on all other circuits "simply because it was the first court presented with the issue." Id. (footnote omitted). "Federal appellate courts can, and do, differ in their conclusions as to the law affecting agency action." Id. That is what makes horseraces and Supreme Court cases.

As noted by the Frock court, the Gebbie petitioners had three choices as to the circuit in which they could bring their claims.[4] Id. Gebbie bound the Board only

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[4]Under 45 U.S.C. § 231g and 45 U.S.C. § 351 et seq. petitioners may file suit in the (cont.)

as to the three named petitioners. Subsequent petitioners could continue to challenge the Board's interpretation as in Shuff v. United States Railroad Retirement Board, No. 80-2791 (7th Cir. Apr. 9, 1981), where, in an unpublished order, the Seventh Circuit summarily reversed the Board, followed Gebbie, and determined the entitlement of the petitioner to dual benefits. However, until the appearance of more far-reaching precedent, the Board was free to continue to apply its interpretation of sections 3(h)(3) and 3(h)(4).

Finally, the subsequent legislative history connected with the OBRA and section 3(h)(6) makes it clear that Congress believed the Board's interpretation of 3(h)(3) and 3(h)(4) to be correct.

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4 (cont.)
court of appeals for the circuit in which they reside, in the District of Columbia Circuit, or in the Seventh Circuit, 45 U.S.C. § 355(f).

The Board, as required by the 1974 Act, reduced the annuity of these employees by the amount of the newly awarded social security benefits. The Board determined that the Social Security Act as in effect in 1974 (which is the measure of the "windfall" component) is zero because such non-dependent males could not have qualified for a husband's social security benefit in 1974. The Court in Gebbie reversed the Board's determination in the case, saying, in effect, that the Social Security Act "as in effect in 1974" should be interpreted in the light of the 1977 decisions. The House bill thus amended the law to make clear that the phrase "the Social Security Act as in effect on December 31, 1974" is intended to mean "the Social Security Act as it was in effect and being administered on December 31, 1974."

H. Conf. Rep. No. 97-208, 97th Cong., 1st Sess. 863, *reprinted in* [1981] U.S. Code Cong. & Ad. News 1010, 1225.

In conclusion, we believe that the Seventh Circuit in *Frock*, in denying dual benefits to individuals whose entitlement to them had not been determined prior to August 13, 1981, applied section 3(h)(6) precisely as Congress intended.

B. The Due Process Claims

Petitioner argues that the Board's failure to provide him with a favorable determination of entitlement prior to the running of the time limits imposed by section 3(h)(6) violated the due process clause of the Fifth Amendment. We do not agree.

As discussed above, the Board was under no obligation to give petitioner a *favorable* determination of entitlement. Therefore,

the question we here address is whether the Board violated petitioner's due process rights by not making some type of determination prior to August 13, 1981, the cutoff date provided by section 3(h)(6).

Petitioner relies primarily on Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). In Logan, the Court held that the failure of a state agency to hold a statutorily mandated hearing within the time limits imposed by that statute deprived Logan of a property right without due process.

The major difference between Logan and this case is that in Logan, the state agency was required by statute to hold a hearing within 120 days. Thus, Logan had an entitlement interest in having his claim heard within the statutory time limit. Here, however, section 3(h)(6) imposes no such obligation on the Board. Section 3(h)(6) only provides that in order to receive dual benefits, an

individual must have been determined prior to August 13, 1981, to be entitled to such benefits. Thus, section 3(h)(6) does not provide petitioner with a due process right to have had his entitlement determined prior to the cutoff date. Therefore, there was no procedure or process denied petitioner which was due him. Frock, supra at 1047.

In addition, we note that the time between the filing of Givens' appeal on April 15, 1980, and the Board's decision on November 10, 1981, was not so unreasonable as to violate due process. See Frock, supra, at 1047 n.13. Cf. Kelly v. Railroad Retirement Board, 625 F.2d 486 (3d Cir. 1980) (delay of three years, nine months, in processing disability claim without valid reason held to violate due process guarantees). Our conclusion in this regard is further supported by a lack of evidence that the Board "deliberately delayed action on [Givens' application]

in anticipation of the passage of section 3(h)(6)," Frock, supra, at 1047 n.13, or as an attempt to take advantage of the running of the time limits in that section. In sum, the Board's actions did not violate Givens' due process rights.

C. Equal Protection: Rational Line Drawing

Petitioner next argues that section 3(h)(6) violates the equal protection principle of the Fifth Amendment[5] by creating a classification system based upon the determination of entitlement by a specific date. Petitioner's claim focuses on the fact that an award of dual benefits under section 3(h)(6) is dependent upon the actions of the Board rather

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[5]Although the language of the Fifth Amendment does not explicitly include an equal protection clause, the implied existence of such a principle has long been recognized as a part of the due process clause. See Fritz, supra, at 173 n.8; Schneider v. Rusk, 377 U.S. 163 (1964).

than upon some type of work-related criteria conceivably within the control of the retiree. Thus, petitioner argues, Congress and the Board have drawn an irrational line between those persons who are and are not entitled to dual benefits.

Much of lawmaking is inherently a process of line drawing. Inevitably, when such a line is drawn, there will exist persons who have fallen just short of the mark and who are not eligible for the protection or benefits provided by the law.

Here, in an attempt to preserve the economic stability of the railroad retirement system by phasing out dual benefits, Congress chose to draw a line based upon whether entitlement to dual benefits had been determined before August 13, 1981, the date of the enactment of section 3(h)(6). After having analyzed this line drawn by Congress, we cannot say that it violates

the equal protection principle.

"[U]nlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time." Hisquierdo v. Hisquierdo, 439 U.S. 572, 575 (1978) (footnote omitted). See Fritz, supra, at 174. Therefore, "we must recognize that the due process clause can be thought to impose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." Goldfarb, supra, at 210. See Fritz supra, at 174-77.

With this standard of review in mind, we find ourselves in agreement with the Frock court that section 3(h)(6) does not establish a wholly irrational classification. As discussed above, Congress sought to protect the railroad retirement system. Arguably, Congress could have eliminated all dual benefits. However, instead, it chose

to recognize and protect "expectations created by court decisions and Board actions. Consideration of such expectations is a legitimate concern of Congress." Frock, supra, at 1047.

D. Equal Protection: Gender Based Discrimination

in his last substantive claim, Petitioner argues that 3(h)(6) violates the equal protection principle in that it improperly insulates the dependency requirements found unconstitutional in Goldfarb. We do not agree.

In Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), the Court articulated a two-part test to determine if such a statute improperly discriminated on the basis of sex. The Court stated:

> The first question is whether the statutory classification is indeed neutral in the sense that it is not

gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. . . . In this second inquiry, impact provides an "important starting point," . . . but purposeful discrimination is "the condition that offends the Constitution."

Id. at 274. (citations omitted) (quoting Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16, 91 (1971).

Here, it is apparent this section 3(h)(6) has a non-discriminatory purpose and is, thus, not covertly gender-based. Frock, supra, at 1048. By way of section 3(h)(6), Congress sought to preserve the solvency of the railroad retirement system by phasing-out dual benefits and by limiting the application of Gebbie. Frock, supra, at 1049.

Nor do we conclude that section 3(h)(6) "reflects invidious, gender-based discrimination." Feeney, supra, at 274. In order to achieve its economic purpose, Congress sought to phase out dual benefits for both men and women. The record simply does not support the argument that Congress "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. at 279.

E. Request for Class Certification.

Petitioner requests that this Court certify a class defined as follows:

> All past and present male railroaders who have had or will have their Railroad Retirement benefits reduced by the amount of the Social Security benefits received by them, and who meet the requirements imposed under §§ 3(h)(3) or 3(h)(4) of

> the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231b(h)(3) or (h)(4), for entitlement to a dual benefit, but who have been, or will be, denied this benefit by the Railroad Retirement Board based on its interpretation of § 3(h)(3), (4) or (6).

Motion of Petitioners Givens, Wells, and Robbins for an Order Certifying the Class and Memorandum in Support at 1-2.

In light of our recent decision in <u>Burns v. United States Railroad Retirement Board</u>, 701 F.2d 189 (D.C. Cir. 1983), we deny petitioner's motion. There, in response to a similar request for class certification, we noted that the structure and duties of United States Courts of Appeals makes them inadequate to provide the type of supervision necessary for class actions. As we stated:

> Rather, we decline to fashion a class action vehicle because our appellate

> mode of proceeding is not compatible with designation and management of a class. We hear cases in three-judge panels and generally schedule a single argument session. Our province is the law; we do not hold hearings to explore fact questions. Class action certification, however, entails continuing court activity, and multiple decisions, some of them fact-based.

Id. at 191.

The rationale of Burns applies equally to the case at hand. As such, the motion for class certification is denied.

III. CONCLUSION

For the above-stated reasons, we find that section 3(h)(6) was properly applied to the Petitioner, and that the section does not violate the Fifth Amendment. The decision of the Railroad Retirement Board is hereby affirmed.

APPENDIX B

RAILROAD RETIREMENT BOARD

____________ Appeal of Jack C. Givens R.R.B. No. A-700-10-3761 ____________	Railroad Retirement Act Claims Appeal Docket No. 1990

The Board has reviewed the record in the appeal of Jack C. Givens from the decision of the appeals referee and has considered the evidence and argument contained therein. The Board affirms and adopts that portion of the decision of the appeals referee which waives the failure of Mr. Givens to meet the time limit for the filing of his appeal to the Bureau of Hearings and Appeals.

Regarding the substantive issue of Mr. Givens' claimed entitlement to a windfall dual benefit under the Railroad Retirement Act, the Board finds that section 1118(e)(3) of Public

Law 97-35, the Omnibus Budget Reconciliation Act of 1981, adds a new subsection (6) to section 3(h) of the Railroad Retirement Act. This new subsection, which became effective August 13, 1981, provides:

> No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to the date of the enactment of this subdivision.

The Conference Report concerning section 1118(e) makes it clear that Congress' intent in enacting this section was to counter the effects of the application of the decision of the United States Court of Appeals for the Seventh Circuit in the case of Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (C.A.7, 1980), on a class-wide basis. 127 Cong. Rec. 5678, 5679 (1981).

The Conference Committee on the Budget Reconciliation Act adopted the Senate version of section 1118(e). In describing the intent behind that provision, the Committee stated:

> The Senate amendment addressed the Gebbie issue by providing that no new windfalls would be payable in connection with annuities awarded after May, 1981, or the enactment date, to any employee based on a spouse's Social Security Act employment. The intent of the provision "unless entitlement of such individual to such amount had been determined prior the date of the enactment of this subdivison" is to cut off windfall awards in all cases where the processing has, for whatever reason, not been completed and the determinations have not been made. (127 Cong. Rec. 5678 (1981)).

No determination as to his entitlement to a windfall benefit has been made in regard to Mr. Givens prior to the resolution of this appeal, either by the Board or by a court. Gebbie was not a class action, and therefore applied only to the three individuals involved in that case. Thus, in effect, section 1118(e)(3) preserves windfalls only for those individuals whose entitlement to such windfalls was determined prior to August 13, 1981, either under the Board's interpretation of that section or by virtue of a court order as was the case with Mr. Gebbie.

Accordingly, the appeal is denied.

/s/ William P. Adams
WILLIAM P. ADAMS, Chairman

/s/ C. J. Chamberlain
C. J. CHAMBERLAIN, Member

/s/ Earl Oliver
EARL OLIVER, Member

APPENDIX C

DEC 11 1980

Walter A. Wells
326 Springfield Terrace
Haddonfield NJ 08033

In reply refer to
R.R.B. No. A
185-10-6819

Dear Mr. Wells:

A review of your file indicates that you were awarded a social security benefit in the amount of $50.00 based upon the earnings of your spouse effective March 1, 1977. At that time your railroad retirement annuity was reduced by a similar amount and with no award of a spouse windfall under the Railroad Retirement Act. The denial of this windfall was not appealed by you within the one year period as prescribed by the Board's regulations. Consequently, your present claim for a spouse windfall must be treated as a request to reopen the initial denial of that benefit.

Board order 75-5 provides that a final decision of the Bureau of Retirement Claims may be reopened only if it was based upon a clear and obvious mistake of fact or law or where such decision was not reasonably supported by the evidence. None of these conditions are present in your case. The decision in the Gebbie case to which you refer affects only the individuals who were parties to that suit and has not been applied to other male railroad retirement annuitants who are claiming a spouse windfall.

In light of the above, the spouse windfall may not be paid to you at this time.

I regret that I cannot give you a more favorable response.

Very truly yours,

/s/
Thomas A. Bodkin
Acting Director of
Retirement Claims

cc: D/O
Philadelphia PA

APPENDIX D

RAILROAD RETIREMENT BOARD

Appeal of	)	
	)	Railroad
James L. Robbins	)	Retirement Act
R.R.B. No. A-307-03-5603	)	Claims Appeal
	)	Docket No. 2061

The Board has reviewed the record in the appeal of James L. Robbins from the decision of the appeals referee and has considered all the evidence and argument contained therein. The Board affirms and adopts the decision of the appeals referee with the following addition:

The Board finds that section 1118(e)(3) of Public Law 97-35, the Omnibus Budget Reconciliation Act of 1981, adds a new subsection (6) to section 3(h) of the Railroad Retirement Act. This new subsection, which became effective August 13, 1981, provides:

"No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to the date of the enactment of this subdivision."

The Conference Report concerning section 1118(e) makes it clear that Congress' intent in enacting this section was to counter the effects of the application of the decision of the United States Court of Appeals for the Seventh Circuit in the case of Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (C.A. 7, 1980), on a class-wide basis. 127 Cong. Rec. 5678, 5679 (1981).

The Conference Committee on the Budget Reconciliation Act adopted the Senate version of section 1118(e). In describing the intent

behind that provision, the Committee stated:

> "The Senate amendment addressed the Gebbie issue by providing that no new windfalls would be payable in connection with annuities awarded after May 1981, or the enactment date, to any employee based on a spouse's Social Security Act employment. The intent of the provision 'unless entitlement of such individual to such amount had been determined prior the date of the enactment of this subdivision' is to cut off windfall awards in all cases where the processing has, for whatever reason, not been completed and the determinations have not been made." (127 Cong. Rec. 5678 (1981)).

No determination as to his entitlement to a windfall dual benefit has been made in

regard to Mr. Robbins prior to the resolution of this appeal, either by the Board or by a court. Gebbie was not a class action, and therefore applied only to the three individuals involved in that case. Thus, in effect, section 1118(e)(3) preserved windfalls only for those individuals whose entitlement to such windfalls was determined prior to August 13, 1981, either under the Board's interpretation of that section or by virtue of a court order as was the case with Mr. Gebbie.

Accordingly, the appeal is denied.

[William P. Adams] /s/

[Earl Oliver] /s/

[C. J. Chamberlain] /s/

APPENDIX E

RAILROAD RETIREMENT BOARD

Appeal of	) Railroad Retirement Act
Elmer F. Lorman	) Claims Appeal
R.R.B. No. A-706-10-5095	) Docket No. 2080

This case is before the Board on the basis of a timely appeal of the notice of a decision of the Director of Retirement Claims, dated June 2, 1981, to reduce the railroad retirement annuity of the appellant, Mr. Elmer F. Lorman.

That notice informed the appellant that based on the decision of the United States Court of Appeals for the Seventh Circuit in the case of Wright v. Califano, 603 F. 2d 666 (C.A. 7, 1979), he was entitled to retroactive social security spouse benefits for the period from September 1, 1976 through February 28, 1977. The notice went on to

inform the appellant that his railroad retirement annuity would be reduced by the exact amount of the social security benefit payable to him, so that there was no additional payment due to the appellant.

In his appeal, the appellant argues that the reduction in his railroad retirement annuity was improper. The Board finds that section 3(m) of the Railroad Retirement Act (45 U.S.C. § 231b(m)) requires that an individual's railroad retirement annuity be reduced by the exact amount of any social security benefit payable to him, and that the reduction in the appellant's railroad retirement annuity due to his entitlement to a social security benefit for the period from September 1, 1976 through February 28, 1977 was correct.

The appellant also appears to be arguing that he should be paid a windfall dual

benefit component pursuant to section 3(h)(3) of the Railroad Retirement Act (45 U.S.C. § 231b(h)(3)), effective September 1, 1976. Such an appeal is barred by the time limits contained in the Board's regulations for the filing of appeals. As the Director of the Bureau of Hearings and Appeals stated in his decison in this case dated May 18, 1982:

> "Implicit in the instant appeal is an appeal of the Bureau of Retirement Claims decision, mailed to the appellant on March 9, 1978, to reduce his railroad retirement annuity by the amount of his social security spouse's benefit. Under the Board's regulations that decision could be appealed to this bureau if such an appeal was made within one year from the date notice of the decision was mailed to the

appellant. 20 C.F.R. § 260.4 (b). No such appeal was ever filed."

Furthermore, the Board finds that even if the time limit for the filing of an appeal on the question of the appellant's entitlement to a windfall dual benefit annuity component had not expired, section 1118(e)(3) of Public Law 97-35, the Omnibus Budget Reconciliation Act of 1981, adds a new subsection (6) to section 3(h) of the Railroad Retirement Act. This new subsection, which became effective August 13, 1981, provides:

"No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to the date of the enactment of this subdivision."

The Conference Report concerning section 1118(e) makes it clear that Congress' intent in enacting this section was to counter the effects of the application of the decision of the United States Court of Appeals for the Seventh Circuit in the case of Gebbie v. United States Railroad Retirement Board, 631 F. 2d 512 (C.A. 7, 1980), on a class-wide basis. 127 Cong. Rec. 5678, 5679 (1981).

The Conference Committee on the Budget Reconciliation Act adopted the Senate version of section 1118(e). In describing the intent behind that provision, the Committee stated:

> "The Senate amendment addressed the Gebbie issue by providing that no new windfalls would be payable in connection with annuities awarded after May 1981, or the enactment

> date, to any employee based on a spouse's Social Security Act employment. The intent of the provision "unless entitlement of such individual to such amount had been determined prior the date of the enactment of this subdivision" is to cut off windfall awards in all cases where the processing has, for whatever reason, not been completed and the determinations have not been made." (127 Cong. Rec. 5678 (1981)).

No determination as to the appellant's entitlement to a windfall dual benefit has been made prior to the resolution of this appeal, either by the Board or by a court. <u>Gebbie</u> was not a class action, and therefore applied only to the three individuals involved in that case. Thus, in effect, section 1118(e)(3) preserved windfalls only for

those individuals whose entitlement tc such windfalls was determined prior to August 13, 1981, either under the Board's interpretation of that section or by virtue of a court order as was the case with Mr. Gebbie. See Frock v. Railroad Retirement Board, 685 F. 2d 1041 (C.A. 7, 1982).

In addition to his appeal to the Board, the appellant has requested the Director of Retirement Claims to reopen his decision dated March 9, 1978, which resulted in the original reduction in the appellant's annuity and the denial of a windfall dual benefit annuity component pursuant to section 3(h)(3) of the Act. Since this appeal is before the Board and the question of reopening the original decision is intertwined with the questions on appeal, the Board will decide whether the initial decision should be reopened.

Reopening of a decision of the Bureau of Retirement Clams, appeal from which is barred by the time limits imposed by Board regulations, is governed by Part 17 of Basic Board Order 75-5. Under that provision, a final decision denying a claim may be reopened if the denial was based upon a clear and obvious mistake of fact or law or if the evidence as of the date of the decision did not reasonably support the decision.

It is the appellant's contention that the denial of a benefit under section 3(h)(3) to him was an error of law in light of Gebbie v. United States Railroad Retirement Board, 631 F. 2d 512 (7th Cir., 1980).

The Board has not acquiesced in the Gebbie decision and it was not a class action. Furthermore, the Board is not required to apply the holding in Gebbie to its nationwide

operations. See <u>Frock</u>, 685 F. 2d at 1046. Consequently, there has been no error of fact or law which would mandate reopening the decision in question and the appellant's request for reopening is denied.

/s/ William P. Adams

/s/ Earl Oliver

/s/ C. J. Chamberlain

APPENDIX F

OCT 21 1982

Mr. Gill Deford
Staff Attorney
National Senior Citizens
Law Center
Suite 201
1636 West Eighth Street
Los Angeles, California 90017

In reply refer to
R.R.B. No. A-700-10-9192

Dear Mr. Deford:

This is in response to your letter of September 15, 1982, wherein you requested that pursuant to 20 CFR 200.1(vi) the annuity of Mr. Charles E. Forseth be increased so as not to reflect a reduction due to his receipt of a husband's benefit under the Social Security Act.

Your letter is considered a request to reopen the decision of the Bureau of Retirement Claims dated November 12, 1980, which resulted in the above reduction and the denial of a benefit under 3(h)(3) or (4) of

the Railroad Retirement Act. Mr. Forseth never appealed from this decision and the time set forth by statute in which he could do so has expired.

Reopening of a decision of the Bureau of Retirement Claims, appeal from which is barred by the statute of limitations, is governed by Part 17 of Basic Board Order 75-5. A final decision denying a claim may be reopened if the denial was based upon a clear and obvious mistake of fact or law or if the evidence as of the date of the decision did not reasonably support the decision.

It is your contention that the denial of a benefit to Mr. Forseth under sections 3(h)(3) and (4) was an error of law in light of Gebbie v. United States Railroad Retirement Board, 631 F. 2d 512 (7th Cir., 1980).

As you know, the Board has not acquiesed in the Gebbie decision and it was not a class action. Furthermore, section 1118(e)(3) of Public Law 97-35, the Omnibus Budget Reconciliation Act of 1981 (95 Stat. 357), added a new subsection (6) to section 3(h) of the Railroad Retirement Act. This new subsection, which became effective August 13, 1981, provides:

> "No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to the date of the enactment of this subdivision."

Thus, section 1118(e)(3) preserves eligibility for windfall benefit only for those individuals whose entitlement to such windfall benefits was determined prior to August 13,

1981, either under the Board's interpretation of that section, whether correct or not, or by virtue of a court order as was the case with Mr. Gebbie. No determination of entitlement to a windfall benefit under section 3(h)(3) has been made as to Mr. Forseth. Consequently, section 3(h)(6) prohibits the payment of the benefits which he seeks. See Frock and Stribling v. United States Railroad Retirement Board, Nos. 81-2187 and 81-2637 (7th Cir., decided August 6, 1982).

Your request for reopening is hereby denied.

Very truly yours,

/s/

Robert S. Kaufman
Director of Retirement
Claims

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No.82-2183 September Term, 1983

Jack C. Givens, on behalf of himself and all others similarly situated
Petitioners

v.

United States Railroad Retirement Board
Respondent

And Consolidated Case Nos. 82-2184, 82-2185, 82-2312 and 82-2313

United States
Court of Appeas
for the District
of Columbia Circuit

FILED DEC 21 1983

GEORGE A. FISHER
CLERK

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges; Van Pelt, U.S. Senior District Judge, District of Nebraska

O R D E R

The Suggestion for Rehearing en banc of Petitioners, filed December 5, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For the Court:
GEORGE A. FISHER, CLERK

By: /s/
Robert A. Bonner
Chief Deputy Clerk

APPENDIX H

45 U.S.C. Section 231b(h)(3)

The amount of the annuity provided under subsections (a) and (b) of this section of an individual who (A) will have (i) rendered service as an employee to an employer, or as an employee representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 231a(a)(1) of this title began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have completed ten years of service prior to January 1, 1975, and is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act on December 31, 1974, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such

individual would have been entitled, upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

45 U.S.C. Section 231b(h)(4)

The amount of the annuity provided under subsections (a) and (b) of this section of an individual who (A) will not have met the conditions set forth in subclause (i), (ii), or (iii) of clause (A) of subdivision (3) of this subsection, but (B) will have completed ten years of service prior to January 1, 1975, and is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act as of December 31 of the calendar year prior to 1975 in which such individual last rendered service as an employee to an employer, or as an employee representative, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such

[illegible]
[illegible]

[illegible]

individual would have been entitled, upon attaining age 65 (or, if later, for January 1975) under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this subchapter or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this sub-

chapter and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

45 U.S.C. Section 231b(h)(6)

(6) No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to August 13, 1981.

45 U.S.C. Section 231b(m)

The annuity of any individual under subsection (a) of this section for any month shall, after any reduction pursuant to paragrpah (iii) of section 231a(a)(1) of this title, be reduced, but not below zero, by the amount of any monthly benefit (before any deductions on account of work) payable to that individual for that month under title II of the Social Security Act.

(1)

No. 83-1793

In the Supreme Court of the United States

OCTOBER TERM, 1984

JACK C. GIVENS, ET AL., PETITIONERS

v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
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18 pp

QUESTION PRESENTED

Whether Section 3(h)(6) of the Railroad Retirement Act of 1974, which eliminates dual benefits based on a spouse's Social Security employment if neither the Railroad Retirement Board nor a court had determined prior to August 13, 1981 that the individual was entitled to such benefits, violates the Due Process Clause of the Fifth Amendment.

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In the Supreme Court of the United States

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v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 720 F.2d 196.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1983, and a petition for rehearing was denied on December 21, 1983 (Pet. App. G1). The petition for a writ of certiorari was filed as of March 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge a decision of the United States Railroad Retirement Board denying them "dual" or "windfall" benefits under Sections 3(h)(3) and 3(h)(4) of the Railroad Retirement Act of 1974, 45 U.S.C. (Supp. V) 231b(h)(3) and (4), by virture of the operation of Section 3(h)(6) of that Act, 45 U.S.C. (Supp. V) 231b(h)(6).

1. Before 1974, individuals fully insured under the Railroad Retirement program and the Social Security program were entitled to benefits under both. The Railroad Retirement Act of 1974 established a system for phasing out this practice. This Court sustained the constitutionality of the phase-out in *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166 (1980). Under the phase-out scheme, a person is entitled to dual benefits only if he "would have been entitled" to Social Security benefits "under the provisions of the Social Security Act as in effect on December 31, 1974" (45 U.S.C. (Supp. V) 231b(h)(1), (2), (3) and (4)).

This case concerns the entitlement of a retired railroad employee to receive windfall benefits based upon his or her asserted eligibility on December 31, 1974 to receive Social Security benefits as the wife, husband, widow, or widower of a person who was permanently insured under the Social Security Act. See 45 U.S.C. (Supp. V) 231b(h)(3) and (4). Application to these persons of the scheme for phasing out windfall benefits was made more complicated by this Court's decision in *Califano* v. *Goldfarb,* 430 U.S. 199 (1977), which held that the Fifth Amendment was violated by a provision in the Social Security Act requiring husbands, but not wives, to prove dependency on their insured spouses in order to receive Social Security spousal benefits. Following *Goldfarb,* the Railroad Retirement Board was required to decide whether railroad retirees were entitled to dual benefits if they were not entitled to Social Security benefits under the law as interpreted as of December 31, 1974, but were entitled to such benefits under *Goldfarb.* The Board concluded that such individuals were not entitled to dual benefits. In *Gebbie* v. *United States Railroad Retirement Board,* 631 F.2d 512 (7th Cir. 1980), however, the Seventh Circuit reached the opposite conclusion as a matter of statutory construction (*id.* at 516).

The *Gebbie* court refused to certify that case as a class action (631 F.2d at 516 n.9), and the Board did not thereafter follow the Seventh Circuit's decision in *Gebbie* when considering applications for benefits filed by other retirees. Nevertheless, Congress was concerned about the consequences that would befall the Railroad Retirement system if the interpretation given the Act by the Seventh Circuit in *Gebbie* were broadly applied. Accordingly, in 1981, Congress added a new Section 3(h)(6) to the Railroad Retirement Act (45 U.S.C. (Supp. V) 231b(h)(6)) eliminating the payment of windfall benefits under 45 U.S.C. 231b(h)(3) or (4) to any additional persons based on their spouses' Social Security employment. Section 3(h)(6) bars the payment of benefits under those provisions to any individual "unless the entitlement of such individual to such amount had been determined prior to August 13, 1981."

2. Petitioner Givens, a retired railroad worker, became eligible for an annuity under the Railroad Retirement Act on January 24, 1975, and his wife was insured under the Social Security Act prior to January 1, 1975. On December 11, 1978, Givens was notified by the Board that he was entitled to receive spousal benefits under the Social Security Act by virtue of the decision in *Goldfarb,* but that because of the offset provision in Section 3(m) of the Railroad Retirement Act (45 U.S.C. 231b(m)), his railroad retirement annuity would be reduced by an equal amount. The Board did not add back a portion of this offset through the dual benefits provision in Section 3(h) of the Act. Givens appealed this denial of dual benefits, and by order dated November 10, 1981, the Board denied his claim on the ground that his eligibility for dual benefits had not been determined prior to August 13, 1981, the cut-off date under Section 3(h)(6) of the Act. The Board explained (Pet. App. A12-A13, B4):

No determination as to his entitlement to a windfall dual benefit has been made in regard to Mr. Givens prior to the resolution of this appeal, either by the Board or by a court. *Gebbie* was not a class action, and therefore applied only to the three individuals involved in that case. Thus, in effect, section [3(h)(6)] preserves windfalls only for those individuals whose entitlement to such windfalls was determined prior to August 13, 1981, either under the Board's interpretation of that section or by virtue of a court order as was the case with Mr. Gebbie.

3. a. The court of appeals sustained the Board's denial of dual benefits to petitioner Givens.[1] The court first rejected the contention that the Board was required to follow the Seventh Circuit's decision in *Gebbie* in its nationwide administration of the Railroad Retirement Act. The court observed that "the *dispositive* effect of *Gebbie* was clearly limited to the three petitioners involved in that case," because the *Gebbie* court had declined to certify the case as a class action on the ground that it was " 'not an appropriate forum for such action' " (Pet. App. A14, quoting *Gebbie,* 631 F.2d at 516 n.9 (emphasis supplied by the court)). Moreover, the court noted that the Seventh Circuit itself had subsequently held that "*Gebbie* 'decided only the entitlement of the individual petitioner[s] in that case' " (Pet. App. A14, quoting *Frock* v. *United States Railroad*

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[1]There were four other individuals (the four other petitioners in this Court) who also sought review of the Board's denial of their applications for dual benefits. The court of appeals observed that only petitioner Givens was "clearly and properly before [the] court," because the cases of the others were "arguably flawed due to [their] failure * * * to exhaust their administrative remedies and/or file a timely appeal" (Pet. App. A3-A4 & n.1). The court did not resolve the question of its jurisdiction over the claims of the other petitioners, however, in view of its disposition on the merits with regard to Givens' claim (*ibid.*).

Retirement Board, 685 F.2d 1041, 1046 (7th Cir. 1982), cert. denied, 459 U.S. 1201 (1983)).

The court of appeals further explained that *Gebbie* was the decision of only one circuit, and "although it must be given deference, it need not be taken by the Board as the law of the land" (Pet. App. A15). In this regard, the court noted that the Seventh Circuit in *Frock* had disavowed any role as the "ultimate decisionmaker" when it stated that "to conclude otherwise would be to make decisions of the Seventh Circuit binding on all other circuits 'simply because it was the first court presented with the issue' " (*ibid.,* quoting *Frock,* 685 F.2d at 1046). Accordingly, the court concluded, "until the appearance of more far-reaching precedent, the Board was free to continue to apply its interpretation of sections 3(h)(3) and 3(h)(4)" (Pet. App. A16). In addition, the court noted that Congress believed in 1981, when it enacted Section 3(h)(6) to eliminate the entitlement to windfall benefits for additional persons in the future, that the Board's interpretation, rather than that of the *Gebbie* court, was correct (Pet. App. A16-A18, quoting H.R. Conf. Rep. 97-208, 97th Cong., 1st Sess. 863 (1981)).

The court of appeals also rejected petitioner Givens' contention that the Board's failure to provide him with a favorable determination of entitlement prior to the August 13, 1981 deadline in Section 3(h)(6) violated the Due Process Clause of the Fifth Amendment (Pet. App. A18-A21). The court noted that the Railroad Retirement Act, unlike the statute involved in *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422 (1982), did not impose a deadline within which the Board was required to render a decision, and that there was no procedure or process that was denied Givens prior to the cut-off date Congress selected (Pet. App. A20). Finally, the court held that Section 3(h)(6) did not violate the equal protection component of the Due Process Clause by creating an irrational classification of those who would and

would not be eligible for benefits (Pet. App. A21-A24) or by perpetuating an impermissible gender-based classification (*id.* at A24-A26).[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. This Court already has denied review of the Seventh Circuit's decision sustaining the validity of Section 3(h)(6) of the Railroad Retirement Act of 1974, *Frock* v. *United States Railroad Retirement Board,* 685 F.2d 1041 (1982), cert. denied, 459 U.S. 1201 (1983), and the Ninth Circuit also recently sustained the same provision. *Spraic* v. *United States Railroad Retirement Board,* No. 83-7908 (June 26, 1984). The decision below does not cause undue hardship or deprive anyone of benefits currently being received; Section 3(h)(6) merely prevents certain individuals from obtaining "dual" or "windfall" benefits in the future. Moreover, the issue presented is unlikely to be of much continuing importance, because Section 3(h)(6) plainly forecloses the payment of dual benefits to persons who did not even apply for them prior to August 13, 1981. Accordingly, further review by this Court is not warranted.

1. Petitioners first contend (Pet. 12-20) that the Seventh Circuit's decision in *Gebbie,* which involved only three claimants and which the Seventh Circuit specifically declined to certify as a class action, nevertheless "obligated the Board to determine entitlement for every other railroader using the same interpretation of [Section 3(h)(3)]." See Pet. 12. For this reason, they contend, the Board should have granted their applications for spousal windfall benefits prior to the August 13, 1981 cut-off date. But as the Ninth

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[2]Petitioner no longer challenges Section 3(h)(6) on the latter ground, and such a challenge would be without merit in any event in light of this Court's decision in *Heckler* v. *Mathews,* No. 82-1050 (Mar. 5, 1984).

Circuit observed, whether or not the Board, prior to the effective date of Section 3(h)(6) of the Act, should have adopted the interpretation given the windfall benefit provision by the Seventh Circuit in *Gebbie* is irrelevant to the validity of the statutory cut-off date that Congress enacted in Section 3(h)(6). This is so because "[t]he language and legislative history of the section show [that] it was intended to overrule *Gebbie* for all cases where, for whatever reason, the retiree had not yet been awarded dual benefits." *Spraic,* slip op. 2720.

In any event, petitioners' contention that the Board was required to review their claims under the interpretation given the Act by the Seventh Circuit in *Gebbie* is without merit. Petitioners state (Pet. 8) that they reside in Ohio, California, and New Jersey — not in any of the States comprising the Seventh Circuit. Their argument therefore is not that the Board must apply the decision of a court of appeals to the claims of all persons residing *within* that circuit. Petitioners instead make the far more sweeping submission that the Board was required to adopt the interpretation by a single court of appeals in *Gebbie* in the Board's nationwide administration of the Act.[3]

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[3]Thus, despite petitioners' inflammatory rhetoric about "nonacquiescence," this case is different from *Lopez* v. *Heckler,* 725 F.2d 1489, 1503 (9th Cir. 1984), petition for cert. pending, No. 84-115 (filed July 20, 1984), upon which petitioners rely (Pet. 15-16). There, the Ninth Circuit held that the Social Security Administration was constitutionally required to apply prior decisions of the Ninth Circuit when reviewing benefit claims filed by other individuals residing in that circuit. We believe the Ninth Circuit was clearly incorrect on this point. See *United States* v. *Mendoza,* No. 82-849 (Jan. 10, 1984). But however that may be, the decision in *Lopez* did not purport to bind the Social Security Administration to apply a single appellate court ruling throughout the Nation, as petitioners urge here. See 725 F.2d at 1496-1497 & n.5; but see *Spraic,* slip op. 2720. *Kirkland* v. *United States Railroad Retirement Board,* 706 F.2d 99, 104 (2d Cir. 1983), upon

Petitioners base this broad argument on the judicial review provisions of the Act. Under 45 U.S.C. 355(f), as made applicable to the Railroad Retirement Act by 45 U.S.C. 231g, the claimant may obtain judicial review of a final decision of the Board in the United States Court of Appeals for any one of three circuits: the Seventh Circuit, the District of Columbia Circuit, or the circuit in which the claimant resides. Because of the Seventh Circuit's nationwide jurisdiction, petitioners argue that "[i]f *Gebbie* is not limited to the three individuals, it must be applied to everyone; there is no middle point" (Pet. 20 n.5). There is no indication, however, that by providing claimants with these alternative forums, Congress intended to give the decisions of the Seventh and District of Columbia Circuits binding effect throughout the United States, essentially indistinguishable from the effect of a nationwide class action or of a statute passed by Congress itself. Moreover, petitioners presumably would apply their argument only if the claimant prevailed in one of those two courts; if the Board prevailed in an action involving a single claimant, other claimants would not be bound. We cannot believe that Congress would have intended such an imbalance in the effect of an appellate ruling. Petitioners also fail to explain what would happen if the Seventh and District of Columbia Circuits — each with nationwide jurisdiction in railroad retirement matters — reached opposite conclusions on the same legal issue. These practical difficulties seriously undermine petitioners' novel submission.

In addition, the Seventh Circuit itself has rejected the notion that the Board was required to give the decision in *Gebbie* binding effect throughout the Nation, eschewing the

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which petitioners also rely (Pet. 18), likewise involved the application of prior appellate precedent within the same circuit. Hence, in adjudicating petitioners' claims for benefits, the Board was no more required to "acquiesce" in *Gebbie* than petitioners were obliged to "acquiesce" in *Frock*.

role of "ultimate decisionmaker" that petitioners seek to thrust upon it. *Frock*, 685 F.2d at 1046. And in this very case, the District of Columbia Circuit, the other court with nationwide jurisdiction in railroad retirement matters, has agreed with the Seventh Circuit's reasoning in *Frock* (Pet. App. A14-A16). Finally, as the court below observed, the legislative history of Section 3(h)(6) "makes it clear that Congress believed the Board's interpretation of [Sections] 3(h)(3) and 3(h)(4) to be correct" (Pet. App. A16), and it enacted Section 3(h)(6) for the purpose of ensuring that the Board's interpretation, not that in *Gebbie*, would be followed.[4] Congress thus was content (and apparently quite relieved) that the Board had not reflexively applied the result in *Gebbie* to the tens of thousands of other retirees who petitioners assert (Pet. 5) are similarly situated.

2. Petitioners next contend (Pet. 20-26) that they had a "vested" right to windfall benefits under Sections 3(h)(3) and 3(h)(4) of the Act as interpreted in *Gebbie*, and that Section 3(h)(6) violates the Due Process Clause under this Court's decision in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), because it validates the Board's refusal to award them windfall benefits prior to August 13, 1981. This argument is insubstantial.

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[4]See H.R. Conf. Rep. 97-208, 97th Cong., 1st Sess. 863 (1981):

> The Court in *Gebbie* reversed the Board's determination in the case, saying, in effect, that the Social Security Act "as in effect in 1974" should be interpreted in light of the 1977 decisions [in *Goldfarb* and related cases]. The House bill thus amended the law to make clear that the phrase "the Social Security Act as in effect on December 31, 1974" is intended to mean "the Social Security Act as it was in effect and being administered on December 31, 1974."

This Court's subsequent construction of a similar provision of the Social Security Act in *Mathews*, slip op. 12-14, is further evidence that the *Gebbie* decision was incorrect.

As an initial matter, as we have explained, the Board was not required to adopt the Seventh Circuit's statutory construction in *Gebbie.* Nor, contrary to petitioners' assertion, did they have a "vested" right to windfall benefits. "[R]ailroad benefits, like Social Security benefits, are not contractual and may be altered or even eliminated at any time." *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. at 174. Indeed, this Court (citing *Fritz*) recognized as much in *Logan* v. *Zimmerman Brush Co.,* the very decision upon which petitioners rely. 455 U.S. at 432-433. When Congress does eliminate a substantive entitlement, "the legislative determination provides all the process that is due, see *Bi-Metallic Investment Co.* v. *State Board of Equalization,* 239 U.S. 441, 445-446 (1915)." 455 U.S. at 433. That is all that happened here. Congress eliminated the substantive right to spousal windfall benefits for a particular category of claimants: those who had not, by August 13, 1981, been affirmatively found in adjudicatory proceedings before the Board or in court to be entitled to them. Put another way, when Congress enacted a new rule of law to be applied by the Board with respect to all future applications for retirement benefits, it also elected to apply that new rule of law in all cases involving claims for spousal windfall benefits that were still pending on administrative or judicial review at the time of enactment and in which a final determination of entitlement therefore had not yet been made. Congress clearly had the authority to require the Board and the courts to apply a change in the law to cases that were pending before them. *Dames & Moore* v. *Regan,* 453 U.S. 654, 685 (1981); *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 102 (1801).

The Court's decision in *Logan* v. *Zimmerman Brush Co.,* upon which petitioners rely, involved entirely different circumstances. In *Logan,* an employee allegedly discharged because of a physical handicap filed a timely complaint of

discrimination with the Illinois Fair Employment Practices Commission, as he was required by state law to do, but the Commission failed to convene a factfinding conference within the period prescribed by statute. The Supreme Court of Illinois held that the Commission was accordingly deprived of jurisdiction to adjudicate the complaint and that the former employee was unable to obtain administrative or judicial review of his discrimination complaint. The Supreme Court of Illinois rejected the former employee's claim that his due process rights would be violated if the Commission's error were permitted, in effect, to extinguish his cause of action. This Court reversed, holding that the right to use the Commission's adjudicatory procedures was a species of property protected by the Due Process Clause and that the former employee had been denied an opportunity for an appropriate hearing on the merits of his complaint " 'at a meaningful time and in a meaningful manner' " (455 U.S. at 437, quoting *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965)).

Thus, in *Logan,* an individual's cause of action was extinguished for no valid reason, but simply because the state authorities had erred. *Logan* therefore involved a deprivation of a *procedural* opportunity to vindicate a substantive right that had not been altered by the legislature. Here, by contrast, Congress extinguished the substantive right itself, by phasing out dual benefits and choosing a date by which all previously filed claims for such benefits were required to have been determined in order to be given grandfather protection.[5]

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[5]In addition, here, unlike in *Logan* v. *Zimmerman Brush Co.,* the Board was not required to issue a decision within a particular time period that had elapsed before the August 13, 1981 cut-off date. In *Logan,* by contrast, the state agency was required to make a decision within 120 days (Pet. App. A19). The court of appeals in this case further concluded that the period of time that elapsed between Givens'

3. Finally, petitioners contend (Pet. 26-34) that Section 3(h)(6) violates the equal protection component of the Due Process Clause because it creates an irrational distinction between those for whom windfall benefits are preserved and those for whom they are not. This argument is without merit. As this Court held in *Fritz*, because Congress could have eliminated windfall benefits altogether, "it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out these benefits. The only remaining question is whether Congress achieved its purpose in a patently arbitrary or irrational way." 449 U.S. at 177. Plainly it did not.

The Court recently stressed, in sustaining another grandfather provision enacted in the wake of *Goldfarb*, that the protection of reasonable reliance interests provides an " 'exceedingly persuasive justification' " for the inevitable line drawing involved in fashioning a grandfather provision. *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 17, quoting *Kirchberg* v. *Feenstra*, 450 U.S. 455, 461 (1981). Here, Congress rationally could determine that the reliance interests of persons who already were receiving windfall benefits under Section 3(h)(3) or (4) or had been determined to be entitled to receive them by the Board or a court were greater than those of individuals who had not yet been found to be entitled to such benefits. In other words, Congress "chose to recognize and protect 'expectations created by court decisions and Board actions. Consideration of such expectations is a legitimate concern of Congress.' " Pet. App. A23-A24, quoting *Frock*, 685 F.2d at 1047. See also *Spraic*, slip op. 2722. Congress's action also

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filing of his application and the Board's decision was not so unreasonable as to violate due process and that there was no evidence that the Board deliberately delayed the processing of his application (*id.* at A20-A21).

was consistent with the familiar practice of applying a change in the law to cases that are still pending before an agency or in court, even though administrative decisions or court decrees that have become final will not be reopened. See page 10, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1984